UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
MOBILE DIVISION

ROBERT L. SORRELLS PLAINTIFF

VS. NO. 11-697

GMAC MORTGAGE, LLC;
SIROTE & PERMUTT;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS;
FEDERAL NATIONAL MORTGAGE DEFENDANTS

COMPLAINT

COME Plaintiffs, by and through counsel, and for their Complaint, state:

PARTIES AND JURISDICTION

1. Plaintiffs are individual residents of Baldwin County, Alabama. GMAC Mortgage, LLC; (hereinafter “the Bank” or “GMAC”) is a foreign corporation which does business in the State of Alabama, and the Servicer of the loan. It is a Pennsylvania corporation which does business in the State of Alabama. Sirote & Permutt is an attorney licensed in Alabama. Mortgage Electronic Registration Systems (hereinafter “MERS”) is a Delaware corporation with its principal place of business in the Commonwealth of Virginia, the original grantee of the note involved in this matter, and doing business in the State of Alabama. Federal National Mortgage (hereinafter “Fannie Mae”) is a District of Columbia corporation, the purported owner of the note, and doing business in the State of Alabama. This Court has jurisdiction over the parties and subject matter of this lawsuit under federal-question jurisdiction under 28 U.S.C. § 1331. Venue is proper.

GENERAL ALLEGATIONS OF FACTS

2. On or about March 14, 2008, the Plaintiff, Robert L Sorrells, executed an interest-only adjustable rate note for the principal sum of $360,000.00 in favor of Homecomings Financial, LLC F/K/A Homecomings Financial Network, Inc., a Minnesota corporation. The

interest rate could vary as set out in the Promissory Note. Payments were to commence May 1, 2008, in the initial monthly payment amount of $1, 575.00 per month. The Note allows for the rate to adjust up to 10.25% cap. The Note was for a term of thirty (30) years, maturing April 1, 2038. A copy of the Note is attached as Exhibit “A”.

3. The Interest Only Period Adjustable Rate Note was not filed of record in Baldwin County Alabama. The Interest Only Period Adjustable Rate Note did not mention MERS. The Interest Only Period Adjustable Rate Note was not endorsed on its face at the closing of the loan.

4. To secure the Promissory Note, the Plaintiffs executed a Mortgage in favor of Homecomings Financial, LLC F/K/A Homecomings Financial Network, Inc, encumbering certain real property in Baldwin County, Alabama, which is described in a description which is attached to the Mortgage, Unit 6A-West, Sorrells Landing.

5. The Mortgage included an adjustable rate rider, copies of which are attached collectively as Exhibit “B”. It states at Paragraph (C):

> “MERS” is Mortgage Electronic Registrations Systems, Inc. MERS is a separate corporation that is acting solely as nominee for Lender, and Lender’s successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware …
>
> (D) “Lender” is HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.”

6. The Mortgage Identification Number (MIN) is located on the 1st page of the Mortgage 10062604765498037. Mortgage Electronic Registration Systems, Inc. (MERS) purports to hold a database of the owner of record as wells as the conveyances on the property registered with it. A public record search in Baldwin County, Alabama, reflects that MERS is acting as nominee for the Lender on the mortgage note. However, it cannot be determined who the actual note holder is currently, nor who is the real beneficiary of the promise to pay the note.

7. Sorrells made monthly payments of $1575.00 on the Note as agreed to Homecomings Financial, LLC.

8. On or about June of 2008 Sorrells moved into the property that is the subject of this Complaint. Shortly after moving in, the housing and financial markets collapsed and his business as a mortgage broker came to a halt. Sorrells was able to find a job at a local bank however it was at a much lower salary.

9. Sometime in this period, the servicing of the loan transferred to GMAC. Given that Sorrells did communicate with GMAC regarding his mortgage, it is reasonable to conclude that some notice of the transfer was provided; however, Sorrells is unable to determine whether that notice complied with the necessary statutory requirements.

10. Sorrells contacted GMAC Mortgage, LLC to request help through a possible loan modification to help with the permanent hardship of decreased monthly income. Sorrells was occupying the property as his permanent living residence.

11. On or about August 1, 2009 GMAC Mortgage, LLC as Servicer of the loan, extended a Loan Modification Agreement to the Plaintiff. The Fixed Rate Loan Modification Agreement did not benefit the Plaintiff. The principal balance increased from $360,000.00 to $369,399.00. The ARM rate did not change to a fixed rate as the rate increases every year 2.50% (August 1, 2009- August 1, 2014); 3.50% (from August 2014-August 2015); 4.50% (from August 2015-August 2016) and 5.25% (from August 1, 2016- August 2038). The payment can increase in these 5 years from $1,575.00 to $1968.82. The payment amounts do not include any required escrow payments for hazard insurance and property taxes. This was not a HAMP loan modification, but rather a less favorable "in-house" loan modification which did not benefit the Plaintiff, but did benefit Defendant GMAC, as GMAC Mortgage, LLC receives fee(s) of $9,399.00, including $1524.00 10/23/09; $800 10/27/09; $800 10/27/09 $800 10/30/09. At the time of the loan modification GMAC Mortgage, LLC was not the owner of records in Baldwin county public records, which still reflected Homecomings Financial, LLC as the mortgage

holder. Please see attached Exhibit C. The Fixed Rate Loan Modification Agreement was not recorded of public record in Baldwin County, and has not been recorded to date.

12. Sorrells, who occupied the home as his current residence as of June 2008; did not receive any Notice of Right to Cancel from GMAC Mortgage, LLC nor were any Adjustable Rate Mortgage Disclosures provided to Plaintiff as required under the Truth in Lending Act, Reg. Z, § 226.19 when the loan terms were modified. Plaintiff made payments as agreed in the loan modification to GMAC of $1575.027 monthly beginning on September 1, 2009 through until October 1, 2010 at which point the Plaintiff fell behind.

13. On or about July 7, 2010, the Plaintiff filed a Petition under Chapter 13 of the Bankruptcy Code. The bankruptcy court is still managing Sorrells' repayment plan, having denied the trustee's motion to dismiss on March 14, 2011. Southern District of Alabama Southern Division, United States Bankruptcy Court, Case No. 10-03081-WSS-13.

14. On or about November 15, 2010 a sworn Affidavit was executed by GMAC Representative Leville Fisher of GMAC. It is unknown if the representative authorizing the affidavit had personal knowledge of the facts. Sorrells cannot determine whether Fisher had personal knowledge because n or about December 10, 2009 in a deposition in a Florida state court foreclosure case, a GMAC Employee "Jeffrey Stephans" testified that **his team** did not verify the accuracy of information; "They do not go into the system and verify the information as accurate. We are relying on our attorney network to ensure that they are asking for the correct information." Furthermore Stephan's testified that when executing an Affidavit- his team brought to him approximately 10,000 affidavits and assignments in a month for him to sign, he did not ascertain who the current promissory note-holder was, even though his affidavits always stated or implied that GMAC was the holder of the note. Please see attached Exhibit D GMAC deposition (pp 12-13). On or about September 20, 2010 the New York Times reports that GMAC Mortgage had issued a 23 state moratorium on foreclosures due to foreclosure deficiencies. The moratorium was issued for only states which were so-called judicial

foreclosure states. The lawyers stated that in many cases, the lenders are not in possession of the original promissory note and had signed affidavits without having personal knowledge of the facts. The article can be found at http://www.nytimes.com/2010/09/21/business/21mortgage.html.

15. Sirote & Permutt acted as attorney in fact in the bankruptcy proceedings for "GMAC". The value of collateral was reported as $226,400.00; Estimated payoff amount $369,387.08. The affidavit reflects an increase from $9105.60 to $9,891.38 due to "Bankruptcy Attorney Fees for MFR" of $650.00 and Accrued Late Charges of $225.78. Please see attached Exhibit E

16. On or about October 14, 2010, Defendant GMAC Mortgage, LLC, filed a Motion for Relief from Stay in Sorrells' bankruptcy. In the Motion for Relief from Stay, "GMAC" states it is acting as Successor in interest to Homecomings Financial Network, Inc. "GMAC" also stated that it held the mortgage lien on the property and that it was entitled to relief from the automatic stay, with a prayer for same. A copy is attached Exhibit F. Based upon the representations of the Bank in the Motion for Relief from Stay, the Bankruptcy Court entered an Order allowing the Bank relief from the stay on November 15, 2010.

17. GMAC filed a second Motion for Relief from Stay on November 19, 2010, which the bankruptcy court denied on December 22, 2010. In that order, the court ruled that the stay would be lifted without further order if Sorrells defaulted on his mortgage arrangements – presumably, the Loan Modification Agreement.

18. On or about July 20, 2011 the Plaintiff, still needing some type of payment reduction or principal reduction as the equity or value of the collateral had decreased from $450,000 to $226,400.00, applied for HAMP loan modification;

19. The Plaintiff received correspondence from GMAC Mortgage, LLC on July 27, 2011 that he had been denied a loan modification due to "HAMP Program denied due to

insufficient income." The letter states on Page 3 that the Creditor's name is GMAC Mortgage, LLC. Please see attached Exhibit G.

20. On or about July 27, 2011 "GMAC" sent a notice stating the account had "defaulted" 10/01/10-07/01/11 and the total amount due was $20,922.4. Please see attached Exhibit H.

21. On or about August 29, 2011 Plaintiff, in an effort to work out loss mitigation efforts; sent all correspondence to negotiate a short sale, as requested by GMAC ResCap Liquidation Advisor, Eddie Gutierrez. Please see attached Exhibit I.

22. On or about September 1, 2011 the Servicer, GMAC Mortgage, LLC sent correspondence to the Plaintiff stating they were assigning a Relationship Manager, Shelia Gasparek to help work out a possible short sale as a solution to Plaintiff's financial hardship. Please see attached Exhibit J.

23. On or about September 5, 2011, Plaintiff discovered that the MERS Register or database, which purports to hold a database of the owner of record as well as the conveyances on the property registered with it, reflected that the current servicer for the Loan registered with MIN 10062604765498037 is GMAC Mortgage, LLC and the Investor was Fannie Mae. Please see attached Exhibit K.

24. On September 6, 2011 Plaintiff sent a Qualified Written Request to GMAC Mortgage, LLC via certified mail and the document was received by GMAC Mortgage, LLC on September 8, 2011. The QWR stated Plaintiff's dispute on the account regarding the balance due from default and foreclosure fees and sought information to determine the current note holder or investor or "Identity of the Note holder". The Qualified Written Request itemized six detailed requests including:

(1) a life of loan transaction history;

(2) disclosure of the securitized trust or SPE Homecomings Financial, LLC securitized the loan into;

(3) to obtain the Pooling and Servicing agreements and proof the note and mortgage reflected a proper chain of title from Homecomings Financial, LLC to the current owner.

(4) a copy of the NPV or Net Present Value test

(5) Identification of the current creditor or note holder and

(6) a complete copy of all loan document or name of custodian as Plaintiff had never received a complete copy of the loan documents at any time. Please see attached Exhibit L.

25. On or about September 15, 2011, Defendant Sirote & Permutt sent a NOTICE OF ACCELERATION OF PROMISSORY NOTE AND MORTGAGE, acting as attorney in fact for GMAC Mortgage, LLC. The amount of default reported in this notice was $372,515.58. The original Note was for the total amount of $360,000.00. The Notice stated that the Servicing of the Loan had been transferred to GMAC Mortgage, LLC and that GMAC Mortgage LLC was accelerating the Note and Mortgage. The notice did not mention that GMAC Mortgage, LLC was collecting the debt for Fannie Mae; Fannie Mae was not mentioned. Please see attached Exhibit M.

26. On or about September 20, 2011 the Plaintiff sent a Dispute letter as defined in Section 603 of the Fair Credit Reporting Act and a Validity of Debt dispute under the Fair Debt Collection Practices Act § 809 via certified mail to GMAC Mortgage, LLC's attorney in fact Sirote & Permutt. The certified letter was received by Sirote & Permutt on or about September 23, 2011. The "Dispute Letter" disputed the validity of the debt Sirote & Permutt was purporting to collect from the Plaintiff on behalf of Mortgage Electronic Registration Systems, Inc; Homecomings Financial, LLC or GMAC Mortgage, LLC as Servicer. The "Dispute Letter" was specific to asking for proof of how the Note and Mortgage had been conveyed from the original creditor to GMAC Mortgage, LLC. Please see attached Exhibit N.

27. On or about September 20, 2011 the servicer, GMAC Mortgage, LLC sent a purported response to the Qualified Written Request initially received by their offices on September 12, 2011 via certified mail. The response stated that the current Master Servicer and Loan Owner was Fannie Mae, 3900 Wisconsin Avenue NW, Washington, DC 20016-2892. This was the first correspondence Plaintiff received which disclosed any involvement; or ownership in the Note to Fannie Mae. The documents sent along with the response included a copy of the Note which was endorsed on its face without recourse by Homecomings Financial, LLC' Assistant Secretary Gloria Peters and without recourse by D. Harkness, Limited Signing Officer of GMAC, the Note contained no other endorsements and no dates. GMAC Mortgage, LLC stated that they would provide no further information, because the request was "either subject to business and trade practices or [does] not relate to the servicing of the account." A copy is attached as Exhibit O.

28. On or about September 23, 2011 Sirote & Permutt sent a letter to Sorrels about "Client GMAC Mortgage, LLC as servicer for Federal National Mortgage". It was an "acknowledgement" of the receipt of the Validation and Dispute Letter dated September 20, 2011. It stated that the foreclosure proceedings had been ceased until a response to the dispute had been provided to Plaintiff. Please see attached Exhibit P.

29. On or about September 27, 2011 GMAC sent correspondence to the Plaintiff re: "Validation of the debt"; GMAC stated that they found no reason or warrant to revise any information previously reported to the credit reporting agencies, that no further investigation would be conducted and failed to provide any specific contact to the Plaintiff. Please see attached Exhibit Q.

30. On or about October 19, 2011 Plaintiff sent a follow up Qualified Written Request to GMAC Mortgage, LLC via certified mail 70111150000111850774 due to the insufficient response provided by GMAC Mortgage, LLC on September 20, 2011. The "QWR" specified what requests were provided in the response and what requests remained unresolved; including

a detailed printout of disputed items/fee(s) on account. The request was specific to the servicing of GMAC Mortgage, LLC duties required under any normal Servicing Criteria. Please see attached Exhibit R.

31. On or about October 24, 2011 Sirote & Permutt, acting as attorney in fact for client :GMAC Mortgage, LLC as servicer for Federal National Mortgage sent correspondence to Plaintiff. It was in response to the dispute Plaintiff sent September 20, 2011; stated a copy of the assignment of mortgage would be forthcoming; and that the amount necessary to reinstate loan (including estimated foreclosure fees and costs) was $27,753.17 and total payoff of $379,553.57 was due through October 31, 2011. The last paragraph stated that GMAC had instructed that Sirote & Permutt proceed with foreclosure as no loss mitigation arrangement had been reached. Please see attached Exhibit S. On or about October 26, 2011 GMAC Mortgage LLC sent an acknowledgement letter to the Plaintiff noting receipt of Sorrells' second QWR of October 19, 2011. Please see attached Exhibit T.

32. On or about October 26, 2011 an Assignment of Mortgage was executed assigning mortgage, collateral for debt from Mortgage Electronic Registration Systems, Inc (the "Assignor) whose address is listed as 1901 E Voorhess Street, Ste C, Danville, IL 61834, to GMAC Mortgage, LLC (the "Assignee). The document is executed on October 26, 2011 by MERS, Mortgage Electronic Registration Systems, Inc purported Assistant Secretary, Robert Lyons but prepared by Colleen McCullough of Sirote & Permutt, P.C. The document was filed in Baldwin County public records on November 14, 2011. Please see attached Exhibit U.

32. On or about November 6, 2011 Plaintiff received another purported response from GMAC to the previous response sent 9/20/11. It states in relevant part "2. The current master servicer is Fannie Mae. The current owner of your loan is Fannie Mae." The response does not delete any of the items Plaintiff initially disputed in writing beginning on September 6, 2011 and only brings up the same disputes borrower has had with the account. Sorrells disputed all the "fees" associated with the loan modification and the fees labeled as

foreclosure/bankruptcy fee(s). Disputed fees include "capitalization of unpaid interest $7,875.00, $338.75 in escrows and $1,185.25 (for fee(s) undisclosed); Foreclosure attorney costs $600.00; Foreclosure service costs $144.64; Foreclosure title costs $200.00; Bankruptcy attorney costs for plan review $200.00; Bankruptcy cost for Proof of Claim $150.00; Bankruptcy attorney costs for filing Motion for Relief $150.00; Bankruptcy attorney costs for drafting Motion for Relief $500.00; Bankruptcy attorney costs $50.00; Bankruptcy attorney costs $50.00. These fees are unauthorized which are labeled foreclosure/bankruptcy costs and fees. Please see attached Exhibit V.

34. On or about November 25 2011, the MERS registered was searched using MERS, homeowner research tools, the current investor and servicer information can be obtained: https://www.mers-servicerid.org/sis/search. The MERS register purports that the current Servicer for the Loan registered with MIN 10062604765498037 is GMAC Mortgage, LLC and the investor is no longer disclosed. The Baldwin county public records search reflects the Grantee of record to be GMAC Mortgage, LLC. Please see attached exhibit W.

35. At all times material hereto, the above-mentioned mortgage, Exhibit "B", is federally regulated mortgage loan as that term is defined in the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601(1) et seq. GMAC Mortgage, LLC has failed to respond properly to borrower complaints; specifically; GMAC Mortgage, LLC

(1) did not conduct an investigation into the dispute as required under 12 USC 2605(e)(2)(B)or(C).

(2) failed to protect Plaintiff's credit rating during the 60 day period following receipt of a qualified written request as required under 2605(e)(3).

(3) failed to provide an acknowledgement letter to the September 6, 2011 QWR.

(4) failed to resolve the dispute on account within 60 days; GMAC Mortgage, LLC failed to comply with 12 U.S.C. § 2605(e) and (f) and Regulation X3500.21(f)(1). Those statutes and regulations require GMAC Mortgage, LLC the servicer to resolve the

complaint within sixty (60) business days of its receipt by sending Plaintiff a written account of the investigation or research into the complaint.

36. GMAC Mortgage, LLC has engaged in continuous unbroken series of activity in violation of the Fair Debt Collection Practices Act. Sirote & Permutt, acting as attorney in fact for GMAC Mortgage, LLC has engaged in continuous unbroken series of activity in violation of the Fair Debt Collection Practices Act. GMAC Mortgage, LLC has engaged in continuous unbroken series of activity in violation of the Truth in Lending Act. GMAC Mortgage, LLC has engaged in continuous and unbroken series of activity in violation of the Real Estate Settlement Procedures Act.

37. GMAC Mortgage, LLC has failed to mitigate damages. Rather than offering the Plaintiff a reasonable loan modification that would provide a tangible benefit such as; fixed rate terms; reduction of principal; the Defendant chose to offer the Plaintiff an in-house loan modification that provided no benefit and caused the borrower to fall further and further behind. The “default fees” that have been charged to the Plaintiff’s account are exuberant and dubious and have been disputed by Plaintiff with written communications. The principal balance of the Plaintiff’s loan has increased from $360,000 at origination to $372,515.58 according to the last payoff quote.

VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)

38. The loan that is the subject of this complaint has at all times qualified as a “debt” for consumer purposes and is covered under 15 USC 1692a(5). The Plaintiffs are “consumers” within the meaning of the Fair Debt Collection Practices Act under 15 USC 1692a(3). GMAC Mortgage, LLC does not qualify as a “creditor” or “original creditor” under 15 USC 1692a(4) and therefore cannot claim to be exempt from the Fair Debt Collection Practices Act. GMAC Mortgage, LLC is not an affiliate of the creditor or original creditor, Homecomings Financial, LLC

FKA Homecomings Financial Network, Inc. as evidenced by the Note attached as Exhibit A and therefore cannot claim exemption from the act under section 1692a(6)(B).

39. Sirote & Permutt as attorney in fact does not qualify as a “creditor” or “original creditor” under 15 USC 1692a(4) and therefore cannot claim to be exempt from the Fair Debt Collection Practices Act. Sirote & Permutt is not an affiliate of the creditor or original creditor, Homecomings Financial, LLC FKA Homecomings Financial Network, Inc. as evidenced by the Note attached as Exhibit A and therefore cannot claim exemption from the act under section 1692a(6)(B).

40. MERS as nominee does not qualify as a “creditor” or “original creditor” under 15 USC 1692a(4) and therefore cannot claim to be exempt from the Fair Debt Collection Practices Act. MERS is not an affiliate of the creditor or original creditor, Homecomings Financial, LLC FKA Homecomings Financial Network, Inc. as evidenced by the Note attached as Exhibit A and therefore cannot claim exemption from the act under section 1692a(6)(B).

41. Fannie Mae does not qualify as a “creditor” or “original creditor” under 15 USC 1692a(4) and therefore cannot claim to be exempt from the Fair Debt Collection Practices Act. Fannie Mae is not an affiliate of the creditor or original creditor, Homecomings Financial, LLC FKA Homecomings Financial Network, Inc. as evidenced by the Note attached as Exhibit A and therefore cannot claim exemption from the act under section 1692a(6)(B).

42. GMAC Mortgage, LLC qualifies as a “debt collector” under the act as the loan was obtained during default as shown in the Assignment of Mortgage filed of record November 14, 2011, after Plaintiff’s loan went into default attached as Exhibit “U “ and defined under 15 USC 1692a(6). Sirote & Permutt qualifies as a “debt collector” under the act as shown in attached Exhibit “M” and defined under 15 USC 1692a(6). The demands Sirote & Permutt sent acting as attorney in fact for GMAC Mortgage, LLC cause Sirote & Permutt to qualify as a “debt collector” as attorneys are no longer exempt.

43. The Fair Debt Collection Practices Act prohibited abusive debt collection practices. One of the provisions under 1692g, Sen R No 95-382,95th Cong., 1st. Sess., p.4, reprinted in 1977 USCCAN 1965, 1968, "This provision will eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid."

44. This Court has jurisdiction of this matter under 15 U.S.C. § 1692k(d) and 28 U.S.C § 1331.

45. Commencing with the first Notice, on or about July 27, 2011, GMAC Mortgage, LLC sent a notice stating the account had "defaulted" under the terms of the Promissory Note and was due for October 1, 2010- July 1, 2011 and the total amount due was $20,922.41; GMAC Mortgage, LLC, Inc has engaged in a continuous unbroken series of activity in violation of the FDCPA.

46. Sirote & Permutt has engaged in a continuous unbroken series of activity of violation of the FDCPA, beginning with the Notice of Acceleration of Promissory Note and Mortgage received by Plaintiff on or about September 15, 2011 and sent to Plaintiff by Sirote & Permutt, acting as attorney in fact for GMAC Mortgage, LLC.

47. The Defendants have violated the FDCPA in the following particulars:

a. Violating § 1692(c)(a)(2), The Defendants have communicated directly with the consumer while knowing that the consumer was represented by an attorney with respect to the debt.

b. Defendants have harassed Plaintiffs with numerous phone calls while they were under Bankruptcy protection, and have further harassed Plaintiff's causing a telephone to ring and engaging Plaintiffs in telephone conversations repeatedly or continuously with intent to annoy, abuse, or harass as prohibited under 15 USC §1692d(5).

c. Defendants falsely represented that it had a right to file Proofs of Claim in the Bankruptcy proceedings noted above, and GMAC Mortgage, LLC did obtain Relief from stay as attached in Exhibit “F”. Furthermore Notices of Default and Intent to Sell were filed to commence sale on the Plaintiff’s property without any information to show either Defendant has the authority to do so. The Assignment of Mortgage was not executed until October 26, 2011 more than 1 month after the acceleration notice was sent. See Exhibit “Notice of Acceleration dated September 15, 2011”. Defendants are using unfair and unconscionable means to collect the debt. They have violated 15 USC § 1692(f) 808(6), which prohibits “Taking or threatening to take any non judicial action to effect dispossession or disablement of property if- (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest.”

d. Defendants are using unfair and unconscionable means to collect the debt, including using collecting amounts which are not expressly authorized by the agreement creating the debt, a deceptive and unfair practice under. 15 USC § 1692(f) 808 (1).

e. Defendants have made false and misleading misrepresentations under 1692(e)(2); falsely representing the character, amount and legal status of the debt.

f. Defendants at no time have ceased collection of the debt or ceased the non-judicial foreclosure process; and have sent communications during the 30-day period that overshadow the initial notice.

48. Section 1692g(b) then provides that if the consumer disputes the debt in writing, the collector must cease further collection efforts until the validation procedures is complied with; Defendants have refused to do so.

49. The Defendants have concealed and misrepresented the identity of the true creditor, as noted above. The original note appears to still be endorsed from Homecomings Financial, LLC to GMAC Mortgage; however the GMAC Mortgage purports in the QWR

Response dated September 20, 2011 that the Master Servicer and Loan Owner is Fannie Mae. Please see attached Exhibit O.

50. The validation notices and notice of acceleration; "overshadowed" and contradicted by the fact that Fannie Mae was not mentioned in the initial notices as being any party to the collection; not named as a creditor; then subsequent collection letters sent within 30 days of the initial notice, September 15, 2011. See Swanson v Southern Oregon Credit Service, Inc. supra 869 F. 2d 1222 (9th Cir. 1988); Harris v Payco General American Credits, Inc., 1998 U.S. Dist. LEXIS 20153 (N.D. Ill. Dec, 9, 1998). "A notice is overshadowing or contradictory if it would make the least sophisticated consumer uncertain as to her rights." Russell v Equifax A.R.S., 74 F. 3d 30 (2d Cir. 1996).

51. On or about September 20, 2011 the Plaintiff sent a Dispute letter as defined in Section 603 of the Fair Credit Reporting Act and Validity of Debt dispute under the Fair Debt Collection Practices Act 209 via certified mail to GMAC Mortgage, LLC's attorney in fact Sirot & Permutt. The "Dispute Letter" was sent within 5 days of the Initial collection notice. The "Dispute Letter" disputed the validity of the debt Sirote & Permutt was purporting to collect from the Plaintiff on behalf of Mortgage Electronic Registration Systems, Inc; Homecomings Financial, LLC or GMAC Mortgage, LLC as Servicer. The "Dispute Letter" was specific to asking for proof of how the Note and Mortgage had been conveyed from the original creditor to GMAC Mortgage, LLC; the validity of the debt. Please see attached exhibit N.

52. On or about September 23, 2011 Sirote & Permutt sent correspondence to Plaintiff re: "Client GMAC Mortgage, LLC as Servicer and for Federal National Mortgage", the letter was an "acknowledgement" of the receipt of the Validation and Dispute letter dated September 20, 2011. It was the first time Sirote & Permutt mentioned Fannie Mae. The letter stated that foreclosure proceedings had been ceased until a response to the dispute had been provided.

53. On or about September 27, 2011 GMAC sent correspondence to the Plaintiff re: "Validation of debt"; GMAC stated they found no reason to warrant or to revise any information previously reported to the credit reporting agencies and that no further investigation would be conducted and failed to provide any specific point of contact for the Plaintiff. Please see attached Exhibit Q.

54. On or about October 19, 2011 Plaintiff sent a follow up Qualified Written Request and Dispute Letter to GMAC Mortgage, LLC via certified mail 70111150000111850774 due to insufficient response provided by GMAC Mortgage, LLC on September 20, 2011 and due to the disputes on the account history provided. The "QWR" and "Dispute Letter" specified what requests were still unresolved including a detailed printout of the exact items disputed on the Plaintiff's account. Please see attached Exhibit R.

55. On or about October 24, 2011 Sirote & Permutt, acting as attorney in fact for GMAC Mortgage, LLC as Servicer for Federal National Mortgage sent correspondence to Plaintiff. The letter stated it was in response to the "Dispute letter"; that a copy of the assignment of mortgage would be forthcoming and that the amount necessary to reinstate the loan was $379,553.57 including $27,753.17 in fee(s) and cost(s). These fee(s) and costs were not itemized at all. The last paragraph stated that GMAC had instructed Sirote & Permutt to proceed with foreclosure as no loss mitigation arrangement had been reached. Please see attached Exhibit S.

56. It is not necessary to show that the plaintiff was actually misled by a collection notice. Avila v Rubin, 84 F.3d at 227 (7th Cir. 1996); Barlett v Heibl, 128 F 3d 497 (7th Cir. 1997).

57. The Defendants are in violation of the Fair Debt Collection Practices Act and in using these deceptive and unfair practices in collecting the debt, the Plaintiff has been damaged in an amount to be determined at trial.

VIOLATION OF THE TRUTH IN LENDING ACT

58. The loan that is the subject of this lawsuit was at all times for consumer purposes. The dwelling has been the Plaintiff's primary residence since June 2008. The loan which is the subject of this lawsuit was originated as a "purchase money transaction" as defined by the Truth in Lending Act, however upon the loan terms being modified on August 1, 2009 the increase in the Principal balance and the security interest taken in the Plaintiff's primary residence triggered the borrower's right of rescission.

59. Supplement 1 to Part 226- Official Staff Interpretations; Section 226.15- Right of Rescission; *15(a) Consumer's right to rescind. Paragraph 15(a)(1). 1. Occurrences subject to right.* Under an open-end credit plan secured by the consumer's principal dwelling, the right of rescission generally arises with each of the following occurrences;

- Opening the account.
- Each credit extension.
- Increasing the credit limit.
- **Adding to an existing account a security interest in the consumer's principal dwelling.**
- **Increasing the dollar amount of the security interest taken in the dwelling to secure the plan. For example, a consumer may open an account with a $10,000 credit limit, $5,000 of which is initially secured by the consumer's principal dwelling. The consumer has the right to rescind at that time and (except as noted in § 226.15(a)(1)(ii)) with each extension on the account. Later, if the creditor decides that it wants the credit line fully secured, and increases the amount of its interest in the consumer's dwelling, the consumer has the right to rescind the increase.**

60. GMAC Mortgage, LLC, upon modifying the terms of the original loan on August 1, 2009 GMAC; added to the existing account a security interest in the consumer's principal dwelling; increased the dollar amount of the security interest taken in the dwelling to secure the

plan from $360,000.00 to $369,399.00; and provided terms that involved an increase in rate each year for the first 5 years.

61. Adjustable rate mortgages (ARMs), which are secured by the borrower's principal dwelling with a maturity longer than one year, are required to be disclosed with additional information. Reg Z. 226.18(f); 52 Fed. Reg. 48665 (Dec 24, 1987). Failure to properly and accurately disclose the requirements of variable rate loans entitles the consumer statutory and actual damages and also rescission right. In re Fidler, 210 B.R. 411 (D. Mass. 1997).

62. In the course of the consumer credit transaction, GMAC Mortgage, LLC failed to deliver the required notices under the Truth in Lending Act and Regulation Z.

63. GMAC Mortgage, LLC, upon modifying the terms of the original loan on August 1, 2009 failed to properly disclose the Maximum interest rate that could be imposed as required under Reg Z. 226.30(a); Fed. Reg. 45611(Dec. 1, 1987). They also failed to provide Plaintiff an ARM brochure as required Reg Z 226.19(b)(1). Finally, they failed to disclose

1) The index or formula used in making adjustments and a source of information for the index or formula. Reg. Z, 12 CFR § 226.19(b)(2)(ii).

2) Current Margin Value and Interest Rate. Reg Z, 12 CFR § 226.19(b)(2)(iv).

3) Negative Amortization: a statement to inform the consumer the consequences of negative amortization. Reg Z, 12 CFR § 226.19(b)(2)(vii); commentary 226.19(2)

64. GMAC Mortgage, LLC, upon modifying the terms of the original loan on August 1, 2009 failed to provide a Historical Example Disclosure as required under U.S.C. 1638; Reg Z. 226.9(b)(2)(viii). GMAC Mortgage, LLC, upon modifying the terms of the original loan on August 1, 2009 failed to provide the proper notice for the borrower to cancel. Each person who has the right to rescind a credit transaction must be provided two copies of rescission notice and the required disclosures in a credit transaction. 15 U.S.C. 1635(a); Reg Z 226.5(b), 226.15(b).

65. If the creditor fails to deliver the required notice of material disclosures, the consumer's right to rescind is automatically extended from three business days to three years. Reg Z 226.23(a)(3).

66. On or about October 26, 2011, GMAC Mortgage, LLC through Sirote & Permutt, its attorney in fact, processed, executed and filed of record in Baldwin County, AL Assignment of Mortgage. It purports to convey, transfer and assign GMAC Mortgage, LLC as the new creditor or "Assignee".

67. A loan servicer may be liable under TILA only if it currently owns or previously owed the mortgage note at issue. See Stump v. WMC Mortgage Corp. No. Civ. A. 02-326, 2005 WL 645238, at *10 (E.D. Pa. Mar. 16, 2005). "TILA contains no provision expressly providing for the liability of servicing agents….However, a servicing agent may be treated as an assignee for liability purposes if it was, at some point in time, the owner of the obligation." Citing 15 USC 1641(f); Clark v Fairbanks Capital Corp., No. 00-C-7778, 2003 WL 21277125, at *3 (N.D. Ill June 2, 2003).

68. GMAC Mortgage, LLC failed to notify the borrower as required under Regulation Z, 15 USC §1641(g) and Public Law 111-22, requiring notice of new creditor. Not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including the identity, address and telephone number of the new creditor; the date of transfer; how to reach the agent or party having authority to act on behalf of the new creditor; the location of the place for transfer of ownership of the debt is recorded; and any other relevant information regarding the new creditor. As used in the Act, mortgage loan means any consumer credit transaction that secured by the principal dwelling of the consumer.

69. Plaintiff has rescinded the transaction on the modification from August 1, 2009 as there is a 3 year right to rescind. (Please see attached Exhibit _______).

70. For the violations of the Truth in Lending Act, Plaintiff has been damaged in an amount to be proven at trial.

VIOLATION OF THE REAL ESTATE SETTLEMENT
AND PROCEDURES ACT

71. At all times material hereto, the mortgage, Exhibit "B", is a "federally regulated mortgage loan" as defined in the Release Estate Settlement and Procedures Act, (hereinafter RESPA), 12 USC §2601(1), *et seq*. Plaintiffs were entitled to have their federally related mortgage transaction serviced according to the criteria outlined in the Pooling and Servicing Agreement, and in accordance with RESPA.

72. The term "servicing" is defined as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan…and making the payments of principal and interest and such other payments with respect to the amount received from the borrower as may be required pursuant to the terms of the loan. 12 USC 2605(e)(1)(B).

73. At present, GMAC Mortgage, LLC is the servicer. GMAC Mortgage, LLC failed to comply with the conditions and terms of servicing federally related mortgage under the proper criteria.

74. GMAC failed to comply with the conditions and terms of the Note and Mortgage and/or RESPA with respect to the proper computation, collection and application of the mortgage payments, the escrow accounts and payments as required under the subject Note and Mortgage.

75. Alternatively, Plaintiff and/or its assignor has collected payments but failed to properly credit Defendant's account, and/or collected mortgage payments and/or escrow payments and did not properly credit or post the payments to Defendant's account in violation of the subject Note and Mortgage.

76. GMAC Mortgage, LLC has failed to respond properly to borrower complaints; specifically; GMAC Mortgage, LLC

(1) did not conduct an investigation into the dispute as required under 12 USC 2605(e)(2)(B)or(C).

(2) failed to protect Plaintiff's credit rating during the 60 day period following receipt of a qualified written request as required under 2605(e)(3).

(3) failed to provide an acknowledgement letter to the September 6, 2011 QWR.

(4) failed to resolve the dispute on account within 60 days; GMAC Mortgage, LLC failed to comply with 12 U.S.C. § 2605(e) and (f) and Regulation X3500.21(f)(1).

Those statutes and regulations require GMAC Mortgage, LLC the servicer to resolve the complaint within sixty (60) business days of its receipt by sending Plaintiff a written account of the investigation or research into the complaint.

77. 12 USC 2605(e)(2) requires a that Servicer must take the following actions within 60 days of receiving a QWR:

(A) Make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) After conducting an investigation, provide the borrower with a written explanation or clarification that includes

i. To the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer; AND

ii. The name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; OR

(C) After conducting an investigation, provide the borrower with a written explanation or clarification that includes

i. Information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer and

iii. The name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

78. On or about September 6, 2011, after repeatedly calling GMAC Mortgage, LLC and getting no help in deleting unearned fee(s) charged to the account for "foreclosure fees" and "bankruptcy fees", the Plaintiff sent a qualified written request to GMAC Mortgage, LLC. The qualified written request was sent to the address specified by GMAC Mortgage, LLC for QWR correspondence. The QWR was dated, signed by the Plaintiffs, contained the proper loan number, and the complaint was specific to the servicing of the loan, that is, an attached printout of the charges disputed and all requests (5) in total outlined under specific headings. Please see attached Exhibit L.

79. GMAC failed to provide an acknowledgement letter within 20 days of receipt of the Qualified Written Request dated September 6, 2011 and received September 8, 2011.

80. On or about September 20, 2011 the servicer, GMAC Mortgage, LLC sent a purported response to the Qualified Written Request initially received by their offices on September 8, 2011 via certified mail. The response stated that the current Master Servicer and Loan Owner was Fannie Mae, 3900 Wisconsin Avenue NW, Washington, DC 20016-2892. This was the first correspondence Plaintiff received which disclosed any involvement; or ownership in the Note to Fannie Mae. The documents sent along with the response included a copy of the Note which was endorsed on its face without recourse by Homecomings Financial, LLC' Assistant Secretary Gloria Peters and without recourse by D. Harkness, Limited Signing Officer

of GMAC, the Note contained no other endorsements and no dates. GMAC Mortgage, LLC stated that any further information would not be provided due to the request being “either subject to business and trade practices or do not relate to the servicing of the account. A copy is attached as Exhibit O.

81. On or about October 19, 2011 Plaintiff sent a follow up Qualified Written Request to GMAC Mortgage, LLC via certified mail 70111150000111850774 due to the insufficient response provided by GMAC Mortgage, LLC on September 20, 2011. The “QWR” specified what requests were provided in the response and what requests remained unresolved**; including a detailed printout of disputed items/fee(s) on account**. The request was specific to the servicing of GMAC Mortgage, LLC. Please see attached Exhibit R.

82. On or about October 26, 2011 GMAC Mortgage, LLC sent an acknowledgement letter to the Plaintiff. Please see attached Exhibit T.

83. The Plaintiff is still no closer to getting the disputed fee(s) corrected and deleted from the account; did not receive credit protection during the 60 days following any Qualified Written Request; did not resolve complaints within 60 days; did not provide acknowledgment letter.

84. The Plaintiff and has been damaged by the Defendants violations of the Real Estate Settlement and Procedures Act in an amount to be proven at trial.

FAILURE TO MITIGATE DAMAGES

85. The original balance of the debt taken out with Homecomings Financial, LLC in March of 2008 was for $360,000.00. In August 2009, rather than provide a reasonable loan modification that would reduce payments; reduce principal; provide a fixed rate and benefit the plaintiff, GMAC Mortgage, LLC chose to rather offer an in-house loan modification to the plaintiff that did not benefit him in anyway. The principal balance was increased from $360,000 to

$369,387.08 and replaced the Interest Only ARM with another Adjustable rate term; the payment increasing from 1575.00 to $1968.82 in 5 years. Please see attached Exhibit C.

86. This payment "modification" provided no relief or change in the monthly payment and actually increased the payment from $1575.00 to $1968.82 in 5 years.

87. In November 2010, during the Plaintiff's bankruptcy proceedings; rather than provide a reasonable proof of claim that would help Plaintiff's repayment plan, GMAC Mortgage, LLC chose rather to increase the amount of monies due by adding "foreclosure" and "bankruptcy" fees increasing the amount again in the proof of claim or Affidavit from GMAC. Please see attached Exhibit E.

88. By September 15, 2011 the Plaintiff's outstanding balance increased to $372,515.58. Please see attached Exhibit M. The Plaintiff has pleaded with the defendant, GMAC Mortgage, LLC to modify the loan terms with a reasonable principal reduction as the Baldwin County assessor only valued collateral in 2010 at $226,400.00.

89. To date, GMAC Mortgage, LLC has failed to mitigate damages and work out a reasonable loan modification or loss mitigation alternative that would benefit the Plaintiff.

CONVERSION

90. Generally, a promissory note may be assigned. When the note is secured by collateral, the assignment of the note carries with it the mortgage or the deed of trust which secures the note. However, mere assignment of a mortgage or deed of trust does not carry with it an assignment of the note. Upon information and belief, the Plaintiff's note at some point has become part of a securitized pool of loans with Fannie Mae, the purported investor. Since the note executed by Plaintiff and the mortgage have made their way into to an unknown securitized trust which has to date been a hidden fact kept from the Plaintiff, as noted above, the note has lost its identity as an obligation secured by the mortgage. It has become a part of a pool in which investors have an undivided right to share in the income produced by the note.

91. Defendant, GMAC Mortgage, LLC, has given on September 15, 2011 “Notice of Acceleration” September 23, 2011; and September 27, 2011 of its intent to accelerate and intent to foreclose on the property. However, as demonstrated above neither GMAC Mortgage, LLC; nor Mortgage Electronic Registration Systems, Inc; nor Fannie Mae had possession of the note. Possession of the note is a prerequisite to foreclosure of property. The original note must be surrendered for cancellation upon foreclosure.

92. GMAC Mortgage, LLC has collected money from the Plaintiffs ostensibly in payment for the note. However, absent the note, any monies collected were collected under a false pretenses, and therefore, money has been converted by the Defendants. Plaintiffs have been damaged by the conversion of the monies they have paid to GMAC Mortgage, LLC in an amount to be proven at trial.

THE NOTE HAS ALREADY BEEN PAID

93. Plaintiff states that upon information and belief and subject to further discovery, the mortgage note has been paid in whole or in part by one or more undisclosed third parties who, prior to or contemporaneously with the closing on the loan, paid the original lender in exchange for certain unrecorded rights to the revenues arising out of the loan documents, therefore providing for payment, accord and satisfaction.

DEMAND FOR JURY TRIAL

94. Plaintiffs demand a jury trial of issues of fact.

WHEREFORE, Plaintiffs pray for all relief to which they are entitled, including, but not limited to the following:

(a) Statutory and actual damages proven;

(b) Compensatory damages proven;

(c) Pre-judgment interest on all amounts recovered as damages;

(d) Court costs, and fees pursuant to the Alabama Litigation Accountability Act, Ala. Code 12-19-270 *et seq.* and applicable federal statutes;

(e) That the Court rescind the transaction and order the Defendants to take all action necessary to terminate the security interest (the mortgage) created under the transaction and declare the mortgage void;

(f) Order the return or refund to Plaintiff any money or property given to anyone in connection with the transactions;

(g) To enjoin the Defendants from further initiating, prosecuting, or maintaining foreclosure proceedings on the property, including a temporary restraining order preventing the foreclosure sale scheduled for the Baldwin County Courthouse steps on December 9, 2011; to that end, Plaintiff appends to this Complaint a Motion for an ex parte Temporary Restraining Order and Brief in support thereof.

(h) and for all other relief to which they are entitled.

Respectfully submitted,

By: /s Matthew Reid Krell____________________
Attorney for Plaintiffs
Alabama Bar No: ASB-5441-H61K

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will electronically notify the below counsel for Defendants of the filing:

Colleen McCullough
Sirote & Permutt
P.O. Box 55727
Birmingham, AL 35255

/sMatthew Reid Krell
Matthew Reid Krell
Attorney for Plaintiffs